



9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2010-1145]

RIN 1625-AA11

Regulated Navigation Area; Pacific Sound Resources and Lockheed Shipyard EPA Superfund Cleanup Sites, Elliott Bay, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a permanent regulated navigation area (RNA) on a portion of Elliott Bay in Seattle, Washington. The RNA will protect the seabed in portions of the bay that are subject to the U.S.

Environmental Protection Agency (EPA)'s Pacific Sound Resources (PSR) and Lockheed Shipyard superfund cleanup remediation efforts. This RNA will prohibit activities that would disturb the seabed, such as anchoring, dragging, trawling, spudding or other activities that involve disrupting the integrity of the sediment caps that cover the superfund sites. It will not affect transit or navigation of the area.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2010-1145 and are available online by going to <http://www.regulations.gov>, inserting USCG-2010-1145 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail LT Ian Hanna, Waterways Management Division, Sector Puget Sound, Coast Guard; telephone 206-217-6045, e-mail SectorPugetSoundWWM@uscg.mil. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On August 1, 2011, we published a notice of proposed rulemaking (NPRM) entitled Regulated Navigation Area; Pacific Sound Resources and Lockheed Shipyard EPA Superfund Cleanup Sites, Elliott Bay, WA in the Federal Register (76 FR 45738). We received 2 comments on the proposed rule. No one requested a public meeting and a public meeting was not held.

Basis and Purpose

Under the Ports and Waterways Safety Act, the Coast Guard has the authority to establish RNAs in defined water areas that are determined to have hazardous conditions and in which vessel traffic can be regulated in the interest of safety. See 33 U.S.C. 1231 and Department of Homeland Security Delegation No. 0170.1.

This rule is necessary to prevent disturbance of the PSR and Lockheed Shipyard sediment caps. It does so by restricting anchoring, dragging, trawling, spudding or other activities that involve disrupting the integrity of the cap in an RNA around the sediment caps. This RNA is similar to RNAs which protect other caps in the area. Enforcement of this RNA will be managed by Coast Guard Sector Puget Sound assets including Vessel Traffic Service Puget Sound through radar and closed circuit television

sensors. The Captain of the Port Puget Sound may also be assisted by other government agencies in the enforcement of this zone.

Background

The PSR superfund site, which is located on the north shore of West Seattle within Elliott Bay, and northwest of the mouth of the Duwamish river, was created by the EPA to cover the remains of the Wyckoff West Seattle Wood Treating Facility. The wood treating facility, which was in operation between 1909 and 1994, was mostly located on a pile-supported facility extending into Elliott Bay. The area was added to the federal Superfund National Priorities List in May 1994. Later that year the entire wood treatment facility was demolished and approximately 4000 cubic yards of highly contaminated soil and process sludge were removed from the site. Construction of a subsurface physical containment barrier was started in 1996 and completed in 1999. The final sediment cap, completed in 2004, is approximately 58-acres which includes approximately 1500 linear feet of shoreline, and intertidal and subtidal areas to depth of about 300 feet.

The Lockheed Shipyard Sediment Operable Unit consists of contaminated near shore sediments within and adjacent to the Lockheed Shipyard on Harbor Island. Harbor Island is

located approximately one mile southwest of the Central Business District of Seattle, in King County, Washington, and lies at the mouth of the Duwamish Waterway on the southern edge of Elliott Bay. The Lockheed Shipyard sediments are located on the west side of Harbor Island and face the West Waterway of the Duwamish Waterway. The final site does not protrude a significant distance into the West Duwamish waterway. Lockheed Shipyards acquired the facility in 1959 and conducted shipbuilding operations there until 1986. In April 1997, Lockheed sold the upland property and its legal rights to the submerged portions of the site to the Port of Seattle. The remedy for the contaminated sediments included demolition of 3 piers, three shipways and one finger pier. The piers and shipways primarily consist of timber superstructures supported by approximately 6000 piles. Contaminants found in sediments which were either dredged or capped are arsenic, copper, lead, mercury, zinc, PAHs and PCBs. The metal contaminants were associated with sand blast grit and paint chips.

Remedial actions for both of these sites as established by the EPA include preventing use of large anchors on the cap. This rulemaking is necessary to assist the EPA in that remedial action.

Discussion of Comments and Changes

We received two positive comments in favor of the proposed rule. One commenter simply expressed support for the proposed rule. The second discussed the environmental benefits of creating an RNA that protects the sediment cap as well as supported the points made in our regulatory analysis. There were no changes made to the rule based on these comments.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. This expectation is based on the fact that the RNA established by the rule would encompass a small area that should not impact commercial or recreational traffic, and prohibited activities are not routine for the designated areas. There have been no

changes to the proposed rule published in Federal Register August 1, 2011 (76 FR 45738).

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which may be small entities: the owners or operators of vessels intending to anchor, dredge, spud, lay cable or disturb the seabed in any fashion when this rule is in effect. The RNA would not have a significant economic impact on small entities due to its minimal restrictive area and the opportunity for a waiver to be granted for any legitimate use of the seabed.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), in

the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though

this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

In preparation for this rulemaking, on October 8, 2010, Sector Puget Sound conducted a tribal consultation with representatives from the Suquamish and Muckleshoot

tribes in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The group noted that the sediment caps were in the usual and accustomed (U&A) fishing grounds of both tribes. Their main concern was that this RNA would prohibit them from exercising their U&A fishing. The Coast Guard and EPA clarified that nothing in this rulemaking is intended to conflict with these tribes' treaty fishing rights and they are not restricted from any type of fishing in the described areas. As a result of the consultation the Coast Guard added paragraph b.(3) to the regulation. There were no comments to the NPRM concerning tribal implications.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore,

it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have

concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2-1, paragraph (34)(g) of the Instruction. This rule involves a regulated navigation area which prevents activities which would disturb the seabed within the areas outlined in this regulation. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department

of Homeland Security Delegation No. 0170.1.

2. Add § 165.1336 to read as follows:

§ 165.1336 Regulated Navigation Area; Pacific Sound Resources and Lockheed Shipyard Superfund Sites, Elliott Bay, Seattle, WA.

(a) Regulated Areas. The following areas are regulated navigation areas:

(1) All waters inside an area beginning at a point on the shore at 47° 35' 02.7"N 122° 22' 23.00"W; thence north to 47° 35' 26.00"N 122° 22' 23.00"W; thence east to 47° 35' 26.00"N 122° 21' 52.50"W; thence south to 47° 35' 10.80"N 122° 21' 52.50"W; thence southwest to a point on the shoreline at 47° 35' 05.9"N 122° 21' 58.00"W.
[Datum: NAD 1983].

(2) All waters inside an area beginning at 47° 34' 52.16"N 122° 21' 27.11"W; thence to 47° 34' 53.46"N 122° 21' 30.42"W; thence to 47° 34' 37.92"N 122° 21' 30.51"W; thence to 47° 34' 37.92"N 122° 21' 27.65"W. [Datum: NAD 1983].

(b) Regulations. (1) All vessels and persons are prohibited from activities that would disturb the seabed, such as anchoring, dragging, trawling, spudding, or other activities that involve disrupting the integrity of the sediment caps installed in the designated regulated

navigation area, pursuant to the remediation efforts of the U.S. Environmental Protection Agency (EPA) and others in the Pacific Sound Resources and Lockheed Shipyard EPA superfund sites. Vessels may otherwise transit or navigate within this area without reservation.

(2) The prohibition described in paragraph (b)(1) of this section does not apply to vessels or persons engaged in activities associated with remediation efforts in the superfund sites, provided that the Captain of the Port, Puget Sound (COTP), is given advance notice of those activities by the EPA.

(3) Nothing in this section is intended to conflict with treaty fishing rights of the Muckleshoot and Suquamish tribes, and they are not restricted from any type of fishing in the described area.

(c) Waivers. Upon written request stating the need and proposed conditions of the waiver, and any proposed precautionary measures, the COTP may authorize a waiver from this section if the COTP determines that the activity for which the waiver is sought can take place without undue risk to the remediation efforts described in paragraph (b)(1) of this section. The COTP will consult with EPA in making this determination when necessary and practicable.

Dated: March 25, 2012

K.A. TAYLOR
Rear Admiral, U. S. Coast Guard
Commander, Thirteenth Coast Guard
District

Date: 04/10/2012]